UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SR INTERNATIONAL BUSINESS INSURANCE CO. LTD.,
Plaintiff-Counterclaim Defendant,

-v.-

WORLD TRADE CENTER PROPERTIES LLC, et al.
Defendants-Counterclaimants.

----------X 01 Civ. 9291 (JSM)

OPINION & ORDER

WORLD TRADE CENTER PROPERTIES LLC, et al.,
Counterclaimants,

-v.-

ALLIANZ INSURANCE COMPANY, et al.

Additional Counterclaim Defendants.

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JOHN S. MARTIN, Jr., District Judge:

SR International Business Insurance Co. Ltd. ("Swiss Re") has moved for an Order compelling testimony by GMAC Commercial Mortgage Corporation ("GMAC") employees and employees of GMAC's insurance advisors, the Harbor Group, Ltd., regarding post-9/11 communications, as well as production of documents drafted by, sent to, or reflecting communications among GMAC employees and Harbor Group employees during the period after September 11,

2001, that have been withheld pursuant to claims of attorney-client privilege and/or work product privilege.

In July 2001, GMAC loaned the Silverstein Parties (the holders of leases on the World Trade Center Complex) $563 million to finance the World Trade Center leasehold, and "securitized" the loan through the issuance of mortgage backed securities to a number of institutional investors. In connection with this transaction, GMAC retained the Harbor Group as its insurance advisor to assist in determining the amount of insurance coverage that GMAC would require the Silverstein Parties to obtain for the World Trade Center.

Subsequent to the destruction of the World Trade Center on September 11, 2001, GMAC and Harbor Group employees gathered information and participated in numerous meetings and other communications, between and among themselves, and with others, including the Silverstein Parties and the Silverstein Parties' attorneys, regarding the insurance aspects of the World Trade Center investment. GMAC claims that all such information gathering activities, and all post-9/11 communications, were undertaken at the direction and under the supervision of GMAC's in-house counsel, and therefore are protected by either the attorney-client or the attorney work product privilege. Furthermore, GMAC claims, in support of this position, that employees of the Harbor Group were functioning as litigation

consultants to GMAC counsel at all times after September 11, 2002, pursuant to a retainer that was reduced to writing in a letter dated October 5, 2002.

In an Opinion and Order dated June 19, 2002, relating to the Silverstein Parties' claims of privilege, this Court set out the basic parameters of the attorney-client and work product privileges. See SR Int'l Bus. Co. Ltd. v. World Trade Center Properties, No. 01 Civ. 9291, 2002 WL 1334821 (S.D.N.Y. June 19, 2002). That Opinion noted that "the purpose of the attorney-client privilege is to 'encourage full and frank communication between attorneys and their clients'", and "does not extend the attorney-client privilege to all those who may have relevant information," Id. at *2 (quoting from Upjohn Co. v. United States,449 U.S. 383, 389, 101 S. Ct. 677, 681 (1981), and that the common interest privilege applies only to parties who share a common legal interest. "The key consideration is that the nature of the interest be identical, not similar, and be legal, not solely commercial." Id. at *3 (quoting North River Ins. Co. v. Columbia Cas. Co., No. 90 Civ. 2518, 1995 WL 5792, *3 (S.D.N.Y. Jan. 5, 1995); Bank Brussels Lambert v. Credit Lynonnais, 160 F.R.D. 437, 447 (S.D.N.Y. 1995)).

With respect to the work product privilege, the Court explained that to be protected from disclosure pursuant to Fed. R. Civ. P. Rule 26(b)(3), material must be (1) a document or

tangible thing, (2) prepared in anticipation of litigation and (3) prepared by or for a party. Id. at *4. The Court also recognized that the work product doctrine has been extended to protect against the questioning of a witness regarding statements made by an attorney, which would reveal the attorney's mental impressions and legal theories in preparation for litigation. However, it also stated that "[w]hile it may be appropriate to preclude questioning specifically designed to discover opposing counsel's work product . . . [this] reasoning should not be extended to preclude any questioning as to what a witness said to another party's attorney." Id. at *6.

A. Investor-related documents (September 11-14)

The documents and testimony sought by Swiss Re fall into five broad categories. The first involves drafts of documents, notes, and written and oral communications between and among GMAC employees, Harbor Group employees, and GMAC in-house counsel, which relate to communications with investors. In an affidavit, GMAC's in-house counsel, Maria Corpora-Buck, stated that on September 11, after hearing of the World Trade Center attacks, she became concerned "about the possibility that GMAC might become involved in litigation as a result of the attacks." (Corpora-Buck Aff. ¶ 4.) Specifically, she knew that GMAC had been involved in a loan transaction involving the World Trade Center leasehold, and understood that GMAC "was already beginning

to receive inquiries from investors about aspects of the loan and specifically about the insurance" on the World Trade Center Complex. (Id.) She stated that at that time she "understood that if investor concerns about the World Trade Center Complex were not satisfied, litigation could ensue," (Corpora-Buck Aff. ¶ 7), and realized that "in order to evaluate and respond to the litigation risks and other legal issues that might confront GMAC," she would need to gather a lot of information quickly. Accordingly, she directed Beth Ann Herrmann, Vice President and Director of Insurance Operations at GMAC, to collect information on insurance issues, and to communicate with and seek the assistance of Peter Lefkowitz and Michael Liebowitz of the Harbor Group, in that regard. (Corpora-Buck Aff. ¶¶ 4, 5, 7, 8.) Ms. Herrmann and Mr. Lefkowitz then worked with counsel in preparing answers to investors' questions, which were posted on a website maintained by Wells Fargo Minnesota, N.A., the trustee of the loan, on September 13, 2001.

In opposing GMAC's claim that the documents and information collected, and the written and oral communications that took place during this process are protected from discovery by the attorney-client and work product privileges, Swiss Re asserts that activities undertaken in order to answer investors' questions after a loss are within the ordinary course of GMAC's mortgage placement and servicing business, and that the

generalized sense that litigation may ensue if investors' concerns are not satisfied is insufficient to qualify efforts to deal with those concerns as being "in anticipation of litigation."

With respect to the asserted work product privilege, the key question is whether the documents sought were prepared "with an eye toward litigation." Hickman v. Taylor, 329 U.S. 495, 511, 67 S. Ct. 385, 393-94 (1947). A document is prepared "in anticipation of litigation" if there is a threat of an adversary proceeding, the document was prepared because of the threat, and the document was created after that threat became real. In re: Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. Lexis 15646, *48 (S.D.N.Y. Oct. 3, 2001). In United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998), the Second Circuit set out the "because of litigation" requirement:

> [A] document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation. Where a document was created *because of* anticipated litigation, and *would not have been prepared in substantially similar form but for the prospect of litigation*, it falls within Rule 26(b)(3).

Id. at 1195 (emphasis added).

Later in that opinion, the Court elaborated:

> The appropriate test is whether 'in light of the document and the factual situation in the

> particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. . . Protection is withheld from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.

Id. at 1202.

See also In re: Grand Jury Proceedings, No. M-11-189, 2001 U.S. Dist. Lexis 15646, *49-50 (S.D.N.Y. Oct. 3, 2001)(It is not enough that the document was created after the threat of litigation is real -- it is "also necessary that the motivation for creating that document be the litigation.").

Mere avoidance of litigation is not the equivalent of "in anticipation of" litigation. As the Court stated in the Grand Jury Proceedings case, "to find that 'avoidance of litigation' without more constitutes 'in anticipation of litigation' would 'represent an insurmountable barrier to normal discovery' and could subsume all compliance activities by a company as protected from discovery." Id. at *52 (quoting In re: William L. Derienzo, 1998 Bankr. Lexis 635, *15 (Bankr. M.D. Pa. April 28, 1998)). See also Upjohn v. Mova Pharmaceutical Corp., 936 F. Supp. 55, 57 (D.P.R. 1996); Tejada Fashions Corp. v. Yasuda Fire and Marine Ins. Co. (UK) Ltd., No. 83 Civ. 5512, 1984 WL 500, *3 (S.D.N.Y. June 18, 1984).

At his deposition, Mr. John Weaver, Executive Vice President and chief credit officer of GMAC, testified that:

> In its normal course after a casualty event,

> [we] would have most likely, or would have I am sure pulled the legal documents and referred to the casualty provisions of the legal documents, and would have, during September, would have sought the insurance policy to review. . . . My understanding of why a statement would be drafted to be put on a web-site, as servicer GMAC . . would communicate with the bondholders through the trustee's web-site, and that is why a statement would have been drafted . . . to communicate with those bondholders.

(Weaver Dep. 43-44.)

No privilege attaches to an attorney's communications when the attorney is hired to give business or personal advice, or to do the work of a nonlawyer. Spectrum Systems, Int'l v. Chemical Bank, 78 N.Y.2d 371, 379, 575 N.Y.S.2d 809, 815 (1991).

Mr. Weaver also testified that the GMAC World Trade Center "Servicing Committee" was created by counsel to gather information regarding the status of loan documentation, legal documents, and insurance to ensure that the bonds were protected, and that counsel's role was to bring order to the data collection process. Thus, even if the answers to investors' questions were prepared at the direction of Ms. Corpora-Buck, the collection of information necessary to prepare those answers and the actual preparation of those answers was in the normal course of GMAC's business as servicer of a loan, and would have taken place with or without her involvement as an attorney. See also Nat'l Cong. for Puerto Rican Rights v. City of New York, 194 F.R.D. 105, 109 (S.D.N.Y. 2000) (finding no

privilege with respect to documents prepared by counsel to respond to a third party request for information); ECDC Environmental, LC v. New York Marine & General Ins. Co., No. 96 Civ. 6033, 1998 WL 614478, *10 (S.D.N.Y. June 4, 1998).

Moreover, neither the attorney-client nor the work product privilege protects underlying facts. As the Supreme Court stated in Upjohn Co. v. United States,

> The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

449 U.S. 383, 389, 101 S. Ct. 677, 682 (1981). Thus, "a party cannot conceal a fact merely by revealing it to his lawyer." Id., 449 U.S. at 396, 101 S. Ct. at 686. See also Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ. 8520, 1999 WL 1006312, *4 (S.D.N.Y. Nov. 4, 1999) ("The fact that the data was funneled by Empire through its attorney for conveyance back to a higher level decision maker within the company does not trigger the protection of the privilege if it would not otherwise apply."); United States v. Davis, 131 F.R.D. 391, 401 (S.D.N.Y. 1990)("[I]n house counsel's law degree and office are not to be used to create a privileged sanctuary for corporate records."); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 93 Civ. 6876, 1995 U.S. Dist. Lexis 14808, *28 (S.D.N.Y. Oct. 10,

1995)("Discoverability of a communication depends on its nature, rather than its source. A fact is discoverable regardless of how a deponent came to possess it.").

Accordingly, documents prepared prior to September 11, from GMAC's or the Harbor Group's files (that are not independently privileged), which were collected pursuant to Ms. Corpora-Buck's direction, information learned in the course of the investigation undertaken under her supervision prior to September 14, as well as all drafts prepared in order to respond to investor questions and communications relating to such questions and responses thereto, are not protected from disclosure.

On the other hand, Ms. Corpora-Buck's oral and written communications, and those of other in-house counsel, to employees of the client (GMAC), as well as communications from GMAC employees to counsel, that contain or seek legal, as opposed to business advice and information, are privileged. The attorney-client privilege also extends to communications between and among non-lawyer employees of the client, who make inquiries at the attorney's direction or relay the attorney's advice on legal, as opposed to business issues, to other employees. Bank Brussels Lambert v. Credit Lyonnais, 160 F.R.D. 437, 442 (S.D.N.Y. 1995).

Communications between GMAC attorneys and employees and the Harbor Group employees are a different matter, however. The Harbor Group is a separate and independent corporation that

provides consulting services to banks, lenders, and other corporate clients relating to insurance issues. (Lefkowitz Aff. ¶2.) Just as this Court found with respect to the relationship between the Silverstein Parties and employees of Willis, there has been no showing, on this motion, either that the Harbor Group employees' roles were functionally equivalent to those of employees of GMAC, or that the Harbor Group shared a common legal interest with GMAC. Since the party claiming privilege and resisting discovery has the burden of establishing the privilege in all respects, United States v. Davis, 131 F.R.D. 391, 402 (S.D.N.Y. 1990), that failure dictates a finding that these communications are not protected by the attorney-client privilege.

The fact that in October 2001, GMAC purported to confirm the retention of "the Harbor Group, and Michael Liebowitz and Peter Lefkowitz, in particular" (Corpora-Buck Aff. ¶ 8), as litigation consultants to GMAC's in-house and outside counsel, retroactively to September 11, does not change this analysis. First of all, the fact that private parties agree that something is privileged does not make it so. Aetna Casualty and Surety Co. v. Certain Underwriters at Lloyd's London, 176 Misc. 2d 605, 613, 676 N.Y.S.2d 727, 733 (Sup. Ct. New York County 1998) ("A private agreement by the parties to protect communications cannot create a privilege."). Furthermore, as the Court stated in In re: Grand

Jury Matter, 147 F.R.D. 82, 84 (E.D. Pa. 1992), "[n]othing in the policy of the privilege suggests that . . . attorneys, simply by placing accountants, scientists or investigators on their payrolls and maintaining them in their offices, should be able to invest all communications by clients to such persons with a privilege the law has not seen fit to extend when the latter are operating under their own steam." Id. (quoting United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961)).

To the extent that GMAC sought advice from the Harbor Group immediately after the events of September 11, it appears that this advice was sought in order to frame responses to investor inquiries, and not "in anticipation of litigation." The only specific litigation concern mentioned in Ms. Corpora-Buck's affidavit is the possibility that "if investor concerns about the WTC Complex were not satisfied, litigation could ensue." (Corpora-Buck Aff. ¶ 7). However, Ms. Corpora-Buck does not state that she had any information available to her at the time that would indicate that the investors would have any basis for a suit against GMAC. Thus, the decision to gather evidence to respond to the concerns of investors was simply good business advice, not a litigation strategy.

While Ms. Corpora-Buck's affidavit seeks to support the claim that the Harbor Group was retained as a "litigation consultant" (Corpora-Buck Aff. ¶8) by reference to a Harbor Group

letter of retention dated October 5, 2001, that letter does not indicate that the Harbor Group was being retained to provide litigation support. First, the letter makes no reference to litigation. It states only that "You have retained us to represent you in connection with the World Trade Center Properties. Our services will include consulting on all insurance matters related to these properties." (Swiss Re's Letter Motion dated May 7, 2002, Ex. D.) Second, the letter is from the Harbor Group to "Mr. Tom Miraglia" who was identified by Mr. Weaver, at his deposition, as "from legal, but was working with the servicing department, in the servicing department." (Weaver Dep. 49.) And finally, the letter is neither to nor from the General Counsel of GMAC, and does not set forth the issues as to which the Harbor Group was being retained, as one would expect if a corporation was retaining an expert to assist it with a major litigation.

In short, the October 5th letter, which confirms nothing more than that GMAC agreed to pay the Harbor Group for consulting on insurance matters related to the World Trade Center, is consistent with the view that the Harbor Group's role in the period immediately after September 11th was simply to provide information to respond to investor's inquiries. Thus, documents and communications between GMAC attorneys or employees and Harbor Group employees during the period immediately after September

11th are not protected by either the attorney-client privilege or the work-product privilege.

Since the questioning of Mr. Lefkowitz and Mr. Liebowitz of the Harbor Group was curtailed by the assertion of the privilege, it is not clear to what extent the insurers will seek to question them about their communications with GMAC attorneys and employees subsequent to September 14th. Since that issue will no doubt arise at a subsequent deposition which will be necessary as a result of this ruling, the Court deems it appropriate to address the matter now.

According to Ms. Corpora-Buck's affidavit, GMAC ultimately set up two committees to respond to the events of September 11th – the "World Trade Center Committee" ("WTC Committee") which met daily with the Chief Executive of GMAC, and the "World Trade Center Servicing Committee" ("WTC Servicing Committee"). While it may be that at some point the Harbor Group did provide advice to these groups, that fact alone would not protect the Harbor Group's communications with GMAC employees or attorneys.

Neither the formation of the above Committees nor any consulting services that the Harbor Group may have performed subsequently for GMAC's counsel with respect to this litigation, can enable GMAC to retroactively insulate fact witnesses from answering questions regarding their knowledge of the facts

underlying this litigation.[1] The situation is analogous to that in which a party attempts to foreclose discovery of a fact witness by designating him as an expert trial witness, thereby limiting discovery to that permitted under Fed. R. Civ. P. Rule 26(b)(4). Discovery cannot be impeded in such a way. As the Court stated in Nelco Corp. v. Slater Electric, Inc., 80 F.R.D. 411, 414 (E.D.N.Y. 1978), "reason dictates that the mere designation by a party of a trial witness as an 'expert' does not thereby transmute the experience that the expert acquired as an actor into experience that he acquired in anticipation of litigation or for trial." Consequently, "[s]uch an expert should be treated as an ordinary witness." North Shore Concrete and Assoc., Inc. v. New York, No. 94-Cv-4017, 1996 WL 391597, *3 (E.D.N.Y. July 10, 1996)(quoting the Advisory Committee Notes to the 1970 Amendment to Fed. R. Civ. P. Rule 26).

While a full record has not been developed as to the functioning of the WTC Committee and the WTC Servicing Committee, it appears both from Mr. Weaver's testimony, and from the name of

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[1]In a striking attempt also to retroactively insulate its own employees from testifying, GMAC goes a step further,, arguing that because Mr. Lefkowitz and Mr. Liebowitz were consultants to GMAC's attorneys as of September 11, GMAC employees' communications with them, as well as all communications between Mr. Lefkowitz and Mr. Liebowitz themselves, were privileged because they (Messrs. Lefkowitz and Liebowitz) were providing information and advice to the GMAC attorneys. Because the Court rejects this tactic, the depositions of GMAC witnesses that have been curtailed due to such claims of privilege will have to be reopened as well.

the WTC Servicing Committee, that this committee, at least, was involved with the servicing of investors and that its activities were business related and not privileged. In any event, to sustain a claim of privilege, GMAC would have to demonstrate that the communications at issue involved something more than the Harbor Group's employees' discussion of their knowledge of the underlying facts of, and their participation in, the events at issue. GMAC would have to establish that specific tasks relating to this litigation were assigned to the Harbor Group by counsel and that responses to the insurers' counsel's questions would disclose information that was provided in confidence to the Harbor Group employees as representatives of counsel, or would disclose material protected by the work product doctrine.

B. The September 14 Meeting

The second set of documents and communications relates to the September 14, 2001 meeting at Silverstein's offices, which was attended by representatives of the Silverstein Parties, the Wachtell firm, Willis, GMAC (Beth Ann Herrmann), the Harbor Group (Peter Lefkowitz), Westfield, UBS/Paine Webber (Westfield's lender), and their respective counsel. (Corpora-Buck Aff. ¶ 9). In the decision of June 19, the Court held that conversations between Silverstein's attorneys and Willis employees prior to their deposition preparation sessions were not privileged. *A fortiori*, communications at the September 14 meeting, which

included those parties, in addition to others, cannot be privileged.[2] Therefore, both Beth Ann Herrmann and Peter Lefkowitz can be questioned about the content of that meeting.

In addition, Swiss Re is entitled to examine the notes of the September 14 meeting taken by Ms. Herrmann and Mr. Lefkowitz. Although apparently these individuals attended the meeting and took notes at the direction, and in the stead of, Ms. Corpora-Buck, and used the notes when reporting back to her about the meeting, the notes are not privileged. They merely set forth the facts that were reported to the attorney. In United States v. Weissman, No. S1 94 Cr. 760, 1995 WL 244522, *4 (S.D.N.Y. April 26, 1995), while discussing the difference between factual and opinion work product, the court stated:

> [N]ot every item which may reveal some inkling of

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[2]The ruling above to the effect that the Harbor Group employees do not share in GMAC's attorney-client privilege also dictates the same result, as does the fact that the Silverstein Parties and GMAC do not share a common legal interest in this litigation. This is demonstrated by GMAC's filing an action in January 2002, titled GMAC Commercial Mortgage Corporation v. 1 World Trade Center LLC, No. 02 Civ. 443, against the Silverstein Parties with respect to the allocation of business interruption insurance payments under the GMAC loan agreements, and Silverstein's counsel's statement in a letter to this Court, that "GMAC . . . has an interest which is in an important respect different from that of the Silverstein Parties: it is at best indifferent to the number of occurrences claimed under the insurance policies in that even if the insurers pay on only one occurrence there would be sufficient funds to take out the GMAC position. Thus, from GMAC's standpoint, if Silverstein were not litigating the number of occurrences at all, GMAC would be pleased."(Letter to Judge John S. Martin, Jr. from Meyer G. Koplow, dated January 17, 2002.)

> a lawyer's mental impressions, conclusions, opinions or legal theories is protected as opinion work product. . . . Whatever heightened level of protection may be conferred upon opinion work product, that level of protection is not triggered unless disclosure creates a real, nonspeculative danger of revealing the lawyer's thoughts.

Id. (quoting In re: San Juan DuPont Plaza Hotel Fire Litigation, 859 F.2d 1007, 1015 (1st Cir. 1987)).

If notes that actually *are* work product and *were* taken by a lawyer can be discovered because they do not reveal counsel's thought processes and opinions, see id.; In re: John Doe Corp., 675 F.2d 482, 493 (2d Cir. 1982); Redvanly v. NYNEX Corp., 152 F.R.D. 460, 466 (S.D.N.Y. 1993), then there is no reason not to order production of notes taken by non-attorneys, Ms. Herrmann and Mr. Lefkowitz, in a context in which there is no realistic way that their disclosure would create "a real, nonspeculative danger of revealing the lawyer's thoughts."

Moreover, even if Ms. Herrmann and Mr. Lefkowitz were themselves attorneys, the result would be the same. As the court stated in In re: Grand Jury Subpoenas dated March 9, 2001, 179 F. Supp. 2d 270, 291 (S.D.N.Y. 2001), "[c]onversations between lawyers where one lawyer is merely relaying factual information, such as a conversation with a third party, to another lawyer are not privileged (or protected by the work product doctrine)."

Finally, the notes do not constitute protected attorney work product for an additional reason. Even though it could be argued

that litigation between the Silverstein Parties and the insurers became foreseeable once the Silverstein Parties adopted the multiple occurrence theory, it was not foreseeable that GMAC would become involved in litigation, other than in a nominal role as a necessary party because of its lien. There has been no showing that GMAC's counsel anticipated litigating the occurrence issue -- either on September 14, or thereafter. In fact, in their Answer and Counterclaim to the Complaint, GMAC and Wells Fargo admit that they are additional named insureds under the coverage issued by Swiss Re (Answer and Counterclaim, ¶ 40), and as a Sixth Affirmative Defense, they state that "the payment of any . . . proceeds is subject to the agreements between [GMAC] and the Silverstein Lessees" (Answer and Counterclaim, ¶ 71), and that "Sections 1.1 and 1.3 of the Mortgage create in favor of [GMAC] a security interest in all of the Silverstein Lessees' rights and interests, tangible and intangible, in the World Trade Center Properties, including with respect to all proceeds from all insurance policies covering the World Trade Center properties." (Answer and Counterclaim, ¶ 73.) None of these statements are adverse to Swiss Re's stated reason for seeking a declaratory judgment in this matter: that "[u]nder no circumstances should Swiss Re be exposed to inconsistent obligations due to the conflicting interests of the insured parties." (Complaint for Declaratory Relief, ¶ 45.) Finally,

Wells Fargo, as successor to GMAC's interest in such insurance proceeds, stated in its Counterclaim, "Pursuant to 28 U.S.C. § 2201, Wells Fargo, for the benefit of the Certificateholders, is therefore entitled to a judicial declaration that (a) Swiss Re is liable, at a minimum, to pay a single 'occurrence' policy limit, and (b) Wells Fargo, for the benefit of the Certificateholders, is entitled to receive proceeds of the Swiss Re coverages as [GMAC] and its successors' and assigns' interests appear under the Loan Agreement." Thus, neither GMAC not Wells Fargo has adopted the position advocated by the Silverstein Parties at the September 14 meeting and in this litigation.

Accordingly, there has been no showing that, at least as of the time of the September 14 meeting, Ms. Herrmann and Mr. Lefkowitz were doing anything more than assisting in gathering information in order to inform, and service the interests of, the bondholders.

C. Post-October "Privileged" Communications with Silverstein's Attorneys

The third category of communications and documents includes "privileged" emails from Silverstein's attorneys, which were copied to Mr. Lefkowitz beginning in October 2001, and communications between Wachtell attorneys and Harbor Group employees during their deposition preparation sessions. Because Silverstein, GMAC and the Harbor Group did not share a common legal interest, these communications clearly are not protected

from disclosure by the attorney-client privilege.

Assuming that these communications constitute work product and reveal the opinions, mental impressions, and strategies of the Wachtell attorneys, their disclosure to persons outside the attorney-client relationship waives the protection of the privilege only if the disclosure is to an adversary, or materially increases the likelihood of disclosure to an adversary. In re: Copper Market Antitrust Litigation, 200 F.R.D. 213, 221 (S.D.N.Y. 2001); Bowne of New York City, Inc. v. AmBase Corp., 150 F.R.D. 465, 479 (S.D.N.Y. 1993). Absent a showing that GMAC and the Harbor Group occupied the type of relationship with Silverstein that would make it likely that these documents would be disclosed to Silverstein's adversaries in this litigation, the work product privilege is not waived with respect to these documents. The documents would, however, be subject to production upon a showing of substantial need. In any event, as stated previously, both the GMAC and the Harbor Group witnesses may be questioned about facts that they learned from these communications. As stated in Bank Brussels Lambert v. Credit Lyonnais, 93 Civ. 6876, 1995 U.S. Lexis 14808, *32 (S.D.N.Y. Oct. 10, 1995),

> There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel. But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the

> impressions of counsel regarding the relative significance of facts. . . Here the effort must be to protect against the indirect disclosure of an attorney's mental impressions or theories of the case.

Id. (quoting Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co., 137 F.R.D. 267 (D. Neb. 1989)).

The right to learn facts of which a witness was informed by his own attorney applies even more forcefully to facts learned from another party's attorney.

D. GMAC Financing Documents

Swiss Re has demanded production of all documents in GMAC's files relating to the World Trade Center loan and securitization transactions. Although GMAC has produced various non-insurance related documents that are related to due diligence, valuation, and anticipated cash flow, it apparently has refused Swiss Re's request, as stated, on grounds of burden and relevance, and has sought to limit its production to insurance related documents, plus documents that the insurers are able to specifically identify. According to Swiss Re, under this limitation, GMAC has failed to produce files and emails of GMAC witnesses who have been noticed for deposition. Swiss Re argues that GMAC cannot be allowed to determine relevance on Swiss Re's behalf, and that all valuation documents and financial projections, for example, are relevant to GMAC's business interruption claims and the insureds' actual cash value claim.

At this stage of this multibillion dollar litigation, with

broad issues in dispute that have not, as yet, been fully defined, the Court cannot permit GMAC to narrowly define which documents in their files are relevant. As the Court stated in United States v. Weissman, No. S1 94 Cr. 760, 1995 WL 244522, *8 (S.D.N.Y. April 26, 1995), "Conceptually, so long as the documents bear upon the disputed issues, [the insurer] may find a beneficial use for them which escapes [the insured's counsel]."

E. Loan Documents from the Files of Cadwalader, Wickersham & Taft

Swiss Re seeks documents concerning the insurance coverage for the World Trade Center from the files of William McInerney, a partner at Cadwalader, Wickersham & Taft ("CWT"), who was GMAC's real estate lawyer for the loan and securitization transactions. Mr. McInerney was listed in a GMAC response to Interrogatories as an individual who may have knowledge concerning the World Trade Center insurance coverage. CWT also is co-counsel for GMAC in this litigation.

GMAC apparently has refused to produce any documents, other than executed deal documents, from Mr. McInerney's files. GMAC also has declined to prepare a privilege log due to the burden involved, since it would include, according to GMAC, virtually every document in CWT's files that is related to this litigation. While the Court is not unmindful of the additional burden that a review of CWT's files places on GMAC's counsel, a request that is limited to documents that were created prior to September 11th,

and that are or were located in CWT's deal-related files, which relate to the insurance coverage and valuation of the World Trade Center, as opposed to every other facet of this loan transaction, is not unreasonable. To generally shield from discovery all documents that are located in CWT's files, which were created prior to a time when there was a reasonable anticipation of litigation, would be to allow a party to "conceal a fact merely by revealing it to his lawyer." Upjohn Co. v. United States, 449 U.S. 383, 396, 101 U.S. 677, 686 (1981).

It also must be remembered that the attorney-client privilege shields only communications that were intended to be held in confidence. In re: Grand Jury Subpoenas dated March 9, 2001, 179 F. Supp. 2d 270, 283 (S.D.N.Y. 2001) ("the privilege does not attach to communications that are intended to be or are disclosed to third parties"). In the context of the preparation of disclosure documents relating to a private placement, statements of the client to the lawyer are generally made with an understanding that the information will be disclosed to others. In that context, such communications are not protected by the attorney-client privilege. See Nat'l Cong. for Puerto Rican Rights v. City of New York, 194 F.R.D. 105, 109 (S.D.N.Y. 2000)(documents prepared by counsel to respond to a third party request for information are not privileged).

Finally, the argument that otherwise unprivileged documents

should be protected from disclosure on the basis that CWT is now co-counsel in this litigation constitutes an attempt to retroactively convert the nature of those documents into work product. This a party cannot do. As the court stated in Dir. of the Office of Thrift Supervision v. Vinson & Elkins, LLP, 168 F.R.D. 445, 446 (D.D.C. 1996),

> The privilege for work product reflects the notion that lawyers generally should not be looked to as sources of evidence to be used against their clients *unless they were participants in the transactions underlying the lawsuit.*

(emphasis added).

To the extent that relevant documents represent privileged communications, a privilege log should be prepared.

CONCLUSION

Swiss Re's motion to compel testimony of GMAC and the Harbor Group witnesses and the production of GMAC, Harbor Group, and CWT documents is granted to the extent set forth above. To the extent that the guidelines set forth herein do not clarify the status of specific documents, they may be submitted to the Court for examination in camera.

SO ORDERED.

Dated: New York, New York
July , 2002

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JOHN S. MARTIN, JR.
U. S. D. J.

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